SUP. CT. U.S.
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No. 96-1965

In The

# Supreme Court of the United States

October Term, 1996

THERESA MARTIN,

*Petitioner,*

*vs.*

SHAW'S SUPERMARKETS, INC.,

*Respondent.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit*

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Are a plaintiff's state law claims against her former employer pre-empted under § 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185(a), (Section 301), when such claims allege violations of Massachusetts statutes the terms of which specifically provide that in the event any right set forth within them are inconsistent with an applicable collective bargaining agreement, that agreement shall prevail, and there is a real interpretive dispute about the meaning of several applicable terms of that collective agreement as applied to the facts of the case?

## STATEMENT OF INTERESTED PARTIES

Petitioner is Theresa Martin.

Respondent is Shaw's Supermarkets, Inc., a wholly-owned subsidiary of J. Sainsbury (USA), Inc. which, in turn, is a wholly-owned subsidiary of J. Sainsbury, plc, the latter of which has issued shares to the public through both the New York and London Stock Exchanges.

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## STATEMENT OF THE CASE

### A. Statement of Facts

Respondent Shaw's Supermarkets, Inc. (Shaw's) employed Petitioner Theresa Martin (Martin) for a number of years prior to August 1994 when she stopped working as a result of a job related injury. She later applied for and received benefits under the Massachusetts Workers' Compensation Act.

Throughout her Shaw's career, a collective bargaining agreement between Shaw's and Local 791 of the United Food and Commercial Workers Union, AFL-CIO (the Union) covered Martin's positions. This collective agreement covers employees working in many of Shaw's stores in both Massachusetts and Rhode Island. In its original form, this collective agreement and its appendices comprise more than one hundred fifty pages of single spaced text, comprehensively regulating the wages, hours and terms and conditions of employment of the employees it covers.[1]

Among other things, this collective agreement grants Shaw's the "sole right . . . to hire, assign and promote Employees . . . subject only to such regulations and restrictions governing the exercise of these rights as are expressly provided in this

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1. Petitioner appended the collective bargaining agreement to her petition at pages 17a-119a. For the convenience of the Court, Respondent will cite to these appendix pages as "CBA at [page]a." Respondent notes, however, that the version of the agreement appearing in the petition's appendix does not reflect how the document appears in its original form. In fact, Respondent discovered at least one important error in Petitioner's reproduction of the agreement. The last phrase on page 76a should read "subject *only to such regulations and restrictions* governing the exercise of these rights as are expressly provided in this Agreement." (The italicized words are omitted in the reproduction.) Respondent does not attempt to verify the accuracy of all other language in the reproduction.

Agreement." (CBA at 76a as corrected, *see* footnote 1.) It also provides that in filling a "full-time clerk" position, Shaw's must give "preference" to "the senior part time Employee provided the Employee is qualified and available." (CBA at 49a.) It further provides: "The Employer shall not enter into individual agreements with Employees with respect to terms and conditions of employment." (CBA at 57a.) It also provides a grievance/ arbitration process for resolving any dispute "concerning the meaning or application of this Agreement." (CBA at 50a-53a.)

When more than a year elapsed and Martin did not return to work, Shaw's terminated her employment in September 1995, referencing collective agreement language providing that a full-time employee (such as Martin) loses her seniority if absent for more than one year because of "illness or other bona fide reason." (CBA at 47a.)[2] The Union later filed a grievance under the collective agreement contesting Martin's discharge. The Union processed this grievance through at least December 7, 1995. (Plaintiff-Appellant's Appendix to First Circuit Brief (First Circuit App.) at 148-150.)

Meanwhile, on October 19, 1995, Martin filed an application for employment with Shaw's seeking a first shift full-time clerk's position, with duties modified in accord with her doctor's restrictions, in bakery or other departments in any one of five Union represented stores. (Opinion at 3a; First Circuit App. at 143-144.) Shaw's did not rehire Martin. (Opinion at 3a.)

**B. Proceedings Below**

In January 1996, Martin filed a complaint against Shaw's in the Bristol County Superior Court of the Commonwealth of

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2. *See also* Opinion of the First Circuit at 2a-3a. A reproduced version of the opinion appears at pages 1a-11a of Petitioner's appendix. Respondent will use the citation form "Opinion at [page]a" to reference the opinion of the First Circuit.

Massachusetts alleging that Shaw's failure to reemploy her pursuant to her October 19, 1995 application for employment constituted (1) an unlawful denial of her right under Massachusetts General Laws Chapter 152, § 75A (§ 75A) to reemployment preference for an employee returning to work from a work related injury, and (2) discrimination against her for exercising her right to seek workers' compensation benefits in violation of Massachusetts General Laws Chapter 152, § 75B (§ 75B). In March 1996, Shaw's removed the case to the United States District Court for the District of Massachusetts and filed a motion for dismissal and/or summary judgment contending that Section 301 pre-empted Martin's claims because their resolution required interpretation of Shaw's collective bargaining agreement with the Union. Martin opposed both the removal of her case to federal court and Shaw's dispositive motions. On June 20, 1996, the District Court denied Martin's motion to remand and granted Shaw's motion to dismiss.[3]

Martin appealed to the First Circuit Court of Appeals. In an opinion by Judge Boudin, that court affirmed the dismissal on January 26, 1997. (Opinion at 11a.) In its opinion, the First Circuit cited the basic principle of *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 407 (1988), that state law claims are pre-empted if they "require construing the collective bargaining agreement." (Opinion at 4a.) The court also cautioned that this *Lingle* test must be read in conjunction with the teaching in *Livadas v. Bradshaw*, 512 U.S. 107, 123, 114 S. Ct. 2068, 2078 (1994), that Section 301 "cannot be read broadly to pre-empt nonnegotiable rights conferred on individual employees as a matter of state law." (Opinion at 4a.)

The First Circuit then struck the balance between this *Lingle* principle and the *Livadas* caution as applied to the unique facts

3. Martin appends the District Court's opinion to her petition at 12a-15a.

of the instant case by pointing out that the particular claims asserted by Martin were, by virtue of state law, negotiable rather than nonnegotiable. Both statutory sections in question provided that " '[i]n the event any right set forth in this section is inconsistent with an applicable collective bargaining agreement,' the agreement shall prevail." (Opinion at 6a, quoting statute.) However, this fact of negotiability was not enough in the court's view to establish pre-emption. The First Circuit held that its further duty was to read the collective bargaining agreement in light of the facts of the case to ensure there was "a *real* interpretive dispute and not merely a pretended dispute." (Opinion at 5a, emphasis in original.)

On the facts of this case, the court then determined that "Shaw's labor agreement is colorably inconsistent with Martin's state law claims," citing as "Shaw's best argument" the specific provisions in the collective agreement granting Shaw's the right to "hire, assign and promote Employees." (Opinion at 7a-9a.) Given this colorable inconsistency, the court found pre-emption because any further dispositive interpretation by any court, state or federal, would undermine the role of arbitration in interpreting the collective agreement and risk "divergent readings of the labor agreement and interference with the grievance process itself." (Opinion at 5a.)

On February 21, 1997, Martin filed a Petition for Rehearing *En Banc*, which petition the court denied on February 28, 1997.[4]

## C. Correction of Misstatements in the Petition

Pursuant to United States Supreme Court Rule 15.1 Respondent brings the following misstatements of fact contained in the petition to the Court's attention.

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4. The First Circuit's Order appears at page 16a of Petitioner's appendix.

Petitioner refers in her petition to "Shaw's' refusal to rehire her after her recovery from her injury." (Petition at 4.) However, Martin misleads in suggesting a "recovery," as if she were without physical limitations at some point preceding her application for employment. More to the point, Petitioner also writes she "permanently injured her back," (Petition at 5), and she sought a position with Shaw's limited in accord with her doctor's restrictions on her activities.

Martin also misstates facts when she asserts: "Martin does not contest her discharge by the Company." (Petition at 5.) Martin most certainly did contest her discharge. On her behalf, her Union filed a grievance pursuant to the collective bargaining agreement, challenging Shaw's right to discharge her and seeking her reinstatement. (Opinion at 3a; First Circuit App. at 150.) Petitioner also filed a charge of discrimination with the Massachusetts Commission Against Discrimination (MCAD), claiming Shaw's discriminated on the basis of age, gender and handicap by failing reasonably to accommodate her physical impairment, discharging her, and not rehiring her. (MCAD Case No. 96-BEM-0269.) While Petitioner's discharge and these contests about it are not the gravamen of her claims under §§ 75A and 75B, it is patently false to say she does not or did not contest her discharge.

Again at page 5 of her petition, Martin misstates argument as fact in saying: "At the time of her termination of employment, Martin lost all rights under the Collective Bargaining Agreement . . . ." The very fact that her Union filed a grievance on her behalf following her discharge reflects the inaccuracy of this statement. She retained the post-termination right under the collective agreement to grieve her discharge.

Finally, Petitioner misstates through omission when she states she "indicated on her application that, consistent with her physician's restrictions, she could work full-time as a bakery

clerk or in other store departments." (Petition at 5.) She fails to include an additional limitation that she set for herself, *i.e.*, that she work on the day shift. (First Circuit App. at 143.) Martin did not even include the substance of her physician's restrictions on her application presuming, apparently, that Shaw's knew the restrictions because she had asked for them and Shaw's had rejected them during the period of her employment. (Opinion at 2a.)

## REASONS FOR DENYING THE WRIT

The Supreme Court should decline certiorari in this case because there is no conflict in the circuits created or reinforced by the First Circuit's decision below, the First Circuit properly stated the applicable rule of law, and there is no merit in other reasons advanced by Petitioner or those reasons do not rise to a level of major national issue warranting grant of certiorari.

### I.

### THERE IS NO CONFLICT IN THE CIRCUITS.

Martin asserts that the decisions of the First Circuit below and the Eighth Circuit in *Davis v. Johnson Controls, Inc.*, 21 F.3d 866 (8th Cir. 1994), *cert. denied*, 513 U.S. 964 (1994), are in conflict with the following five decisions in four other circuits: *Loewen Group Int'l, Inc. v. Haberichter*, 65 F.3d 1417 (7th Cir. 1995); *Gay v. Carlson*, 60 F.3d 83 (2d Cir. 1995); *Hirras v. National Railroad Passenger Corp. d/b/a Amtrak*, 44 F.3d 278 (5th Cir. 1995); *Martin Marietta Corp., Aero & Naval Systems v. Maryland Comm'n on Human Relations*, 38 F.3d 1392 (4th Cir. 1994); *Kohl's Food Stores, Inc. v. Hyland*, 32 F.3d 1075 (7th Cir. 1994). (Petition at 12-16.) The only part of this assertion with which Shaw's agrees is that the decision of the First Circuit below is consistent with that of the Eighth Circuit in *Davis*.

The holdings in *Gay, Martin Marietta, Loewen Group Int'l* and *Hirras*, are not in conflict with the First Circuit's decision below. As discussed earlier, the linchpin of the First Circuit's decision is its determination from the literal wording of the statutes themselves that the Massachusetts legislature, in enacting §§ 75A and 75B, has "*chosen* to make the substantive rights conferred by the statutes" negotiable in collective bargaining. (Opinion at 7a, emphasis in original.) By way of contrast, not only do *Gay, Martin Marietta, Loewen Group Int'l* and *Hirras not* involve §§ 75A and 75B, they do not involve any statute, regulation, or other enactment of any state that even arguably intends to make its substantive rights negotiable in collective bargaining.[5]

While the Seventh Circuit's decision in *Kohl's* involved a fact pattern closer to the instant case, there is in the final analysis no conflict between that Seventh Circuit decision and the decision of the First Circuit. The linchpin of the decision of the *Kohl's* majority panel was that the intent of the Wisconsin legislature in enacting the statute involved in that case was to make its substantive terms nonnegotiable. *See Kohl's*, 32 F.3d at 1079 ("By enacting Wis. Stat. § 102.35(3) Wisconsin has decided to impose a rule of entitlement on all employers within its jurisdiction. This entitlement is guaranteed to all Wisconsin employees."). In contrast, the First Circuit held that the Massachusetts legislature intended the terms of §§ 75A and 75B to be negotiable.[6]

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5. The Fourth Circuit in *Martin Marietta* explicitly distinguished the Eighth Circuit's decision in *Davis* on this precise ground, *i.e.*, *Davis* involved state regulation clearly intending negotiability, whereas, the state's intent in the state law involved in *Martin Marietta* was that its substantive provisions were to be nonnegotiable. *Martin Marietta*, 38 F.3d at 1400-01.

6. Indeed, the First Circuit made precisely this point with regard to § 75B in *Magerer v. John Sexton & Co.*, 912 F.2d 525, 529-30 (1st Cir.

(Cont'd)

In sum, there is nothing in the First Circuit's opinion that precludes it from deciding any or all of *Kohl's*, *Gay*, *Martin Marietta*, *Loewen Group Int'l* and *Hirras* the way the other circuits decided them, if substantially similar facts, including the same state statutes involved in those five cases, were to confront the court.

## II.

## THE FIRST CIRCUIT PROPERLY STATED THE APPLICABLE RULE OF LAW.

Because the First Circuit properly stated the applicable rule of law, this Court should not grant the petition for a writ of certiorari. *See* Sup. Ct. R. 10. In particular, the court below cited the basic principle of *Lingle* in conjunction with the teaching of *Livadas* in holding that Section 301 pre-empted Petitioner's state law claims. The First Circuit applied the rule of law that federal law pre-empts state law claims if they "require construing the collective bargaining agreement." (Opinion at 4a, quoting *Lingle*, 486 U.S. at 407.) The court also applied the cautionary rule that Section 301 "cannot be read broadly to pre-empt nonnegotiable rights conferred on individual employees as a matter of state law." (Opinion at 4a, quoting *Livadas*, 512 U.S. at 123, 114 S. Ct. at 2078.)

Applying these properly stated rules, the First Circuit held that the invoked Massachusetts statutes, §§ 75A and 75B, expressly established negotiable rather than nonnegotiable rights for employees like Petitioner seeking rehire following on-the-job injury. The court further determined upon its review of the

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1990). (*See* Opinion at 7a.) Thus, the Massachusetts legislature had many years to amend this statute to avoid the First Circuit's interpretation if such avoidance were in fact desired.

applicable collective bargaining agreement between Shaw's and the Union that a *real* interpretive dispute existed. (Opinion at 5a-11a.) Accordingly, the court recognized that resolution of this real interpretive dispute was not within its bounds, as to entertain it would require the court to engage impermissibly in collective agreement interpretation.

The most Petitioner can really argue is that, in her opinion, the First Circuit misapplied the properly stated rule of law. She argues both that the court below misconstrues the Massachusetts statutes as creating negotiable rights and errs in seeing a real interpretive dispute in the collective bargaining agreement. Even if Petitioner were right (which she is not) the Supreme Court should not grant certiorari under these circumstances. Petitioner offers no compelling reason why the Court should review her case on a writ of certiorari — that is, why the Court should elevate from the mundane rejection to the rare exception this, at best, arguable "misapplication of a properly stated rule of law." *See* Sup. Ct. R. 10.

## III.

## PETITIONER'S OTHER ARGUMENTS DO NOT WARRANT REVIEW ON A WRIT OF CERTIORARI.

Martin asserts that the decision of the First Circuit below contradicts *Livadas* and other authority in that it enables "virtually every employer with a collective bargaining agreement" to evade the reach of §§ 75A and 75B. (Petition at 16-19.) This assertion is meritless because it both misreads the First Circuit's opinion and fails to take into account the widely varying nature and scope of the terms that can and do exist in collective bargaining agreements. It misreads the opinion by ignoring the court's conclusion that, before pre-emption can be found, the trial court must carefully relate the facts of the pending case to the specific terms of the particular collective agreement

involved to ensure there is "a *real* interpretive dispute and not merely a pretended dispute." (Opinion at 5a, emphasis in original.) Since the instant case involves a refusal to hire, the First Circuit below understandably identified specific language in the collective bargaining agreement involving management's right to hire as "Shaw's best argument" for pre-emption. Indeed, the lengthy collective agreement involved in this case is an unusually sophisticated and detailed agreement carefully delineating rights and obligations of Union, employer and employees *vis-à-vis* each other, as well as rights of groups of represented employees *vis-à-vis* each other — *e.g.*, part-time compared to full-time employees; warehouse compared to store employees. Shaw's maintains there are other provisions of its collective agreement, such as the preference required to be given Union represented part-timers over rehires whose seniority has been lost (like Martin), (CBA at 49a), and the contractual prohibition against Shaw's making an individual agreement with Martin to comply with her doctor's restrictions, (CBA at 57a), that also support the First Circuit's pre-emption finding.

In contrast, there are many collective bargaining agreements whose terms are not as sophisticated and detailed as those in the Shaw's agreement.[7] The decision of the First Circuit would certainly permit a finding of no pre-emption were Martin's facts to arise under any such agreements. Finally, as the court below concluded: "the [statute] in question permits the union on behalf of its members to craft its own regime (the agreement) and in it, either to preserve or displace another regime (specified provisions of state law). Viewed in the large, there is no

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7. For example, so-called "short form" management rights clauses, unlike the Shaw's management rights clause, do not spell out the right to hire and other specific rights. *See* N. Peter Lareau, *Drafting the Union Contract*, § 2.05 at 2-28 (1996). *See also* Bureau of National Affairs, *Basic Patterns in Union Contracts* 99 (14th ed. 1995), where it is reported that only twenty-three percent (23%) of the contracts in the survey's data base contained hiring provisions.

discrimination whatever against union members; Massachusetts simply allows the union to negotiate for a different package of benefits." (Opinion at 11a.)

Martin also expresses concern about an alleged "disarray in the circuits" as to whether an asserted defense can give rise to removal. (Petition at 19-28.) The initial problem with Martin's concern is that it has no relevance to her case. An essential element of any claim under §§ 75A or 75B is that the claimed right not be inconsistent with a collective bargaining agreement. This lack of inconsistency requirement is written into the *state* law itself. Thus, it is Martin's state law claim — not any asserted defense plucked from out of the air by Shaw's — that creates the need to interpret the collective bargaining agreement. In short, even if this Court were to believe that there is any out of the ordinary "disarray in the circuits" as to when and if pre-emption can be predicated upon a defense, and further to believe that, for some reason, this "disarray" rises to the level of a pressing national problem warranting grant of certiorari, the instant case is the wrong vehicle for addressing any such "disarray."

Additionally, Martin is just plain wrong. Many of the cases cited by Martin offer garden variety holdings that a collective bargaining agreement cannot pre-empt a claim under a state statute whose provisions are *nonnegotiable*. *See, e.g., Martin Marietta*, 38 F.3d at 1400; *Local No. 57 v. Bechtel Power Corp.*, 834 F.2d 884, 889 (10th Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988). Others are cases where the court found no pre-emption because an interpretation of a collective bargaining agreement was, at most, peripheral to, rather than central to, plaintiff's claim. *See, e.g., Hirras*, 44 F.3d at 282;[8] *Loewen Group Int'l*, 65

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8. Indeed, the Fifth Circuit's *Hirras* opinion specifically reaffirmed its earlier decision in *Baker v. Farmers Electric Cooperative, Inc.*, 34 F.3d 274 (5th Cir. 1994), where, in a situation unlike *Hirras*, the court held it

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F.3d at 1421. In sum, rather than being in "disarray" the circuits have been rather consistent in applying the following principles in their post *Lingle* treatment of Section 301 pre-emption claims: (1) there is no pre-emption of a claim under a state statute, constitutional provision, or regulation, the terms of which the state intends as *nonnegotiable*; however, (2) there is pre-emption of a state claim under a statute the state intends as *negotiable* or of a state tort or contract claim when the interpretation of the collective bargaining agreement is central to, rather than peripheral to, the resolution of the state claim.

Stated otherwise, Martin misreads and misinterprets relevant case law in asserting a non-existent "disarray" as to whether pre-emption can be a defense. In cases involving Section 301 pre-emption, the real issue is not offense versus defense.[9] In those cases involving claims under *negotiable* state statutes, the only real issue is whether interpreting the collective bargaining agreement is essential to resolution of the state claim.

Next, Martin asserts that the First Circuit's application of pre-emption to extinguish a state law claim of someone not covered by a collective bargaining agreement is "unprecedented." (Petition at 28-30.) First, this assertion is plainly wrong given

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could not resolve a state intentional infliction of emotional distress claim without interpreting a collective bargaining agreement to determine whether defendant employer had the right to reassign plaintiff employee different duties. *Hirras*, 44 F.3d at 283. In *Baker*, the court found pre-emption. *Baker*, 34 F.3d at 282.

9. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 393-94 (1987) ("The complete pre-emption corollary to the well-pleaded complaint rule is applied primarily in cases raising claims pre-empted by § 301 of the LMRA."). Where, as here, a real interpretive dispute regarding terms of a collective agreement underlies an asserted state law claim, pre-emption and removal are appropriate. (Opinion at 3a n.1.)

the precedent of the earlier decision of the Eighth Circuit in *Davis*. Second, this is *not* a case where it is clear that the collective bargaining agreement did not cover Martin at all relevant times. At the very time Martin submitted her job application upon which her state law claims rest, her Union was pursuing a grievance on her behalf, alleging her earlier discharge violated the collective bargaining agreement and seeking her reinstatement. The District Court and the First Circuit noted the existence of this grievance. (District Court Decision at 15a; Opinion at 3a.)

Finally, even assuming, *arguendo*, that the First Circuit's decision below was "unprecedented" because the collective bargaining agreement did not cover Martin at all relevant times, it does not follow that the Court should review the case on a writ of certiorari. Martin's suggestion that the First Circuit's decision "foreshadows the absurd result of applying Section 301 preemption to virtually any individual who applies for work with . . . any . . . unionized employer in Massachusetts," (Petition at 29), is itself absurd.[10] The First Circuit predicated its decision upon specific hiring language found in Shaw's collective bargaining agreement, language that is unlikely to exist in bargaining agreements of all (or even most) other unionized Massachusetts employers. (*See* footnote 7.)

Finally, Petitioner's arguments notwithstanding, the First Circuit's decision does not result in unfair prejudice to Martin or any other Shaw's employee when one considers the totality of rights involved. Fairness must be viewed from the camera angle of the entire package of rights of injured employees negotiated by Shaw's and the Union. A basic principal of the bargain struck in their collective agreement is that there should

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10. Research discloses no national epidemic of cases involving employer assertions of Section 301 pre-emption of claims of persons not covered by collective bargaining agreements.

be no distinction between the job protection rights possessed by an employee because of the happenstance that his injury happened to be occupational rather than non-occupational. Thus, employees covered by the Shaw's labor contract have extensive job protection rights for the first twelve months of any injury - protection far more expansive and favorable to the employee than that provided by any federal or state statute, including §§ 75A and 75B. However, the *quid pro quo* is that all such job protection ceases after twelve months — again regardless of whether the injury is occupational or non-occupational. Since the overwhelming majority of employees who are injured can return to work in less than twelve months, this overall bargain grants Shaw's employees, as a whole, far more rights than it takes away. This is precisely the kind of flexibility, to devise arrangements that make business sense to employers and are fair to employees, that the Massachusetts legislature intended to grant employers and unions in enacting §§ 75A and 75B, and that the First Circuit respected in its decision below.

## CONCLUSION

The Court should decline certiorari in this case because the First Circuit's opinion below neither creates nor reinforces a conflict among the circuits, the First Circuit properly stated the applicable rule of law, and Petitioner's arguments lack merit or do not present the type of major national issue warranting grant of certiorari.

Respectfully submitted,

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